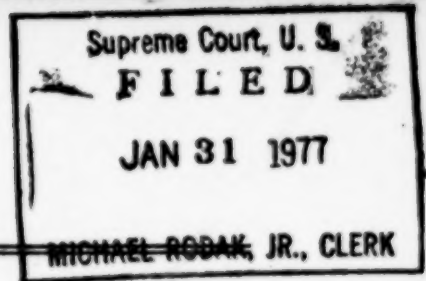


76-1046



IN THE
Supreme Court of the United States

October Term, 1976
No.

IN THE MATTER OF

J., S., & C.

PETITION FOR A WRIT OF
CERTIORARI TO THE
SUPREME COURT OF NEW JERSEY

E. CARRINGTON BOGGAN
Boggan & Thom
Attorneys for Petitioner
5 East 57th Street
New York, New York 10022

(6049)

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. _____

IN THE MATTER OF J., S., & C.

PETITION FOR A WRIT OF
CERTIORARI TO THE
SUPREME COURT OF NEW JERSEY

Petitioner Bruce R. Voeller, the
natural father of J., S., and C., prays
that a writ of certiorari issue to review
the judgment of the New Jersey Supreme
Court dismissing his appeal from the judg-
ment of the Superior Court of New Jersey,
Appellate Division, which affirmed an
order of the Superior Court of New Jersey,
Chancery Division, Bergen County, awarding

counsel fees of \$3,000 to petitioner's former wife to be paid by petitioner, and denying petitioner's application for counsel fees.

OPINIONS BELOW

The order of the New Jersey Supreme Court is set out in the Appendix, infra, p. 1a. The New Jersey Supreme Court issued no opinion. The opinion of the Appellate Division of the Superior Court is set out in the Appendix, infra, p. 2a. The order of the Superior Court, Chancery Division, is set out in the Appendix, infra, p. 7a. The transcript of the hearing on counsel fees in the Superior Court, which sets forth the reasons for the order and which is relied upon in the decision of the Appellate Division, is set forth in the Appendix, infra, p. 12a.

JURISDICTION

The order of the New Jersey Supreme Court was entered on November 1, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

RULE INVOLVED

Rule 4:42-9(a)(1) of the Rules of the Superior Court of New Jersey states:

(1) In a matrimonial action, the court in its discretion may make an allowance, both pendente lite and on final determination, to be paid by any party to the action, including, if deemed to be just any party successful in the action; but no allowance shall be made as to nonmatrimonial issues merely because joined with matrimonial issues.

QUESTION PRESENTED

Whether the award of counsel fees to petitioner's former wife from petitioner, and the denial of petitioner's appli-

cation for counsel fees, was in violation of petitioner's right to equal protection of the law under the Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE CASE

The controversy below which resulted in the denial of petitioner's application for counsel fees and the award of counsel fees to petitioner's former wife of \$3,000 to be paid by petitioner was a proceeding to determine petitioner's visitation rights with his children, J., S., and C. The petitioner and his former wife had previously been divorced, and the Superior Court which decreed the divorce had reserved the issue of the extent of petitioner's visitation rights for a subsequent hearing.

The hearing involving petitioner's visitation rights was lengthy, and involved

the presentation of expert testimony on the subject of the effect of petitioner's openly acknowledged homosexuality on his right to visitation with his children. The hearing resulted in an order imposing certain conditions on petitioner's exercise of visitation rights with his children. Review of that order and those portions of the decisions below respecting petitioner's visitation rights is not sought here.

After the hearing on the question of petitioner's visitation rights was concluded, counsel for petitioner's former wife made an application for counsel fees of \$14,000. Counsel for petitioner also requested an award of counsel fees. A hearing on the issue was held on March 10, 1976 (App. p. 12a). That hearing resulted in an order awarding counsel for petitioner's former wife \$10,000 in counsel fees, \$3,000 of which was to be paid

by petitioner, and \$7,000 by petitioner's former wife, and denying petitioner's application for counsel fees (App. p. 7a).

The Final Judgment of Divorce between petitioner and his former wife ordered that "the parties shall each bear his own cost of suit and legal fees." Also incorporated in the Final Judgment was the Property Settlement Agreement of the parties entered into on February 26, 1973. That agreement included the oral settlement reached before the Trial Court by the parties' counsel that each party would bear his own legal fees for any prospective hearings on visitation rights.

With the Property Settlement Agreement it had also been determined that petitioner's former wife was to pay petitioner \$13,000 for his share

of equity in the marital home.* As an accommodation to his former wife, petitioner agreed to receive \$8,000 of the sum in thirty-six monthly installments of \$222.22 each, without interest.

The Property Settlement Agreement was predicated on the fact that petitioner was receiving a salary of \$17,500 per year. He has now an income of only \$10,400 per year.

Petitioner's former wife has begun to practice her dual profession as a pediatrician and neurologist, and even three years ago was making over \$40,000 per year.

Petitioner's former wife clearly has the financial wherewithal to pay her own counsel fees. She is a pediatric-

*In the Agreement, petitioner relinquished all his interest in all the household furnishings and family car to his former wife, property which had a total value of over \$20,000.

neurologist who has chosen to practice her profession. Her present earning capacity is over \$40,000 a year and she is just beginning the large upswing of income reasonably anticipated for a physician qualified in the rare joint specialty of pediatrics and neurology. Her present income is at least equal to the combined incomes of her and petitioner at the time of the divorce.

Approximately a \$3,000 balance remains in the \$8,000 debt petitioner is owed as his share in the marital property, and this amount is being held in escrow pending determination of this matter. This \$3,000 balance will be eliminated if the \$3,000 award of counsel fees to petitioner's former wife is upheld. Petitioner contends that this is a clear-cut case where the wife has the financial ability to pay her own counsel fees and the husband does not, and that he is entitled to

an award of counsel fees from his former wife.

REASONS FOR GRANTING THE WRIT

The award of counsel fees to petitioner's former wife and the denial of counsel fees to petitioner constitutes sex discrimination and denies petitioner the equal protection of the laws guaranteed by the Fourteenth Amendment.

According to Rule 4:42-9(a)(1) of the Rules of the Superior Court of New Jersey, counsel fees may be awarded to or by any party in the action. In matrimonial actions the two parties are usually male and female. The term "any party" in such cases would necessarily be interpreted to mean that either female or male parties to the action may be awarded counsel fees. Consistent award of counsel fees to a female whether there is a financial need

or not excludes compliance with the Rule that any party, including males, will be awarded counsel fees. The Rule, although sex neutral on its face, has been unequally applied in this case, discriminating against petitioner.

As shown previously, petitioner's former wife can pay her own counsel fees. Thus, the only possible ground for the award of counsel fees to her is on the basis of a stereotypical distinction that she is the female partner in the marriage and traditionally the female partner is without financial resources and the male partner is the breadwinner. The award, thus, presents a clear case of discrimination based on sex. It is grounded on a traditional view of sex roles and not the facts of this case where the female is highly trained and earning an income which will adequately enable her to pay counsel fees.

The sex discrimination denies petitioner the equal protection of the laws and does not bear a fair and substantial relation to any legitimate state purpose. The equal protection clause requires at a minimum that gender-based classifications be "reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." Reed v. Reed, 404 U.S. 71, 76, citing F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920). It is petitioner's position that the award of counsel fees plainly fails to meet this standard.

The meaning and precise application of the "fair and substantial relationship" standard of review in cases of classification by gender is still an evolving state. However, it is perfectly

plain that this standard of review implies more scrutiny of classificatory choices than does the traditional "rational relationship" test.

Under the traditional "rational relationship" test, it is undoubtedly true that nearly any classification passed constitutional muster upon the least showing of some legitimacy. Indeed, if any purpose to the classification could be conceived by the Court, even if it was not the purpose of the rule or legislation, the classification was upheld. See, e.g., McGowan v. Maryland, 366 U.S. 420 (1961); Gunther, Forward: In Search of Evolving Doctrine on a Changing Court: A Model For A Newer Equal Protection, 86 Harv.L.Rev. 1 (1972).

The tests in recent equal protection cases are discernibly more precisely tailored to a reconciliation of the competing constitutional values which are at

stake. On sex discrimination cases the Supreme Court has explicitly repudiated sex-role stereotypes as a predicate for classificatory distinctions. The Court's recent decisions have made this clear. In Frontiero v. Richardson, 411 U.S. 677 (1973), it was held that gender-based discrimination in the allocation of fringe benefits to members of the uniformed services violates the equal protection clause. Mr. Justice Brennan, announcing the judgment of the Court, acknowledged that, "there can be no doubt that our Nation has had a long and unfortunate history of sex discrimination." 411 U.S. at 684. After describing the "gross, stereotypical distinctions between the sexes" that resulted from such discrimination, he continued:

Moreover, since sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special

disabilities upon the members of a particular sex because of their sex would seem to violate 'the basic concept of our system that legal burdens should bear some relationship to individual responsibility...' Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 175 (1972). As a result, statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members. 411 U.S. at

In Weinberger v. Weisenfeld, 43 U.S.L.W. 4393 at 4396 (March 19, 1975), the Supreme Court was just as emphatic in its rejection of "archaic and overbroad" generalizations which are not to be tolerated under the Constitution. There is declared unconstitutional a "gender-based differentiation that results in the efforts of women workers required to pay social security taxes producing less protection for their families than is produced by the efforts of men." 43 L.W. at 4396. The assumption

underlying the differentiation, that men are more likely than women to be the primary supporters of their families, was rejected as a

gender-based generalization that cannot suffice to justify the denigration of the efforts of women who do work ... 43 L.W. at 4396.*

Discrimination against men or women which flows from the assumption is constitutionally intolerable after Weisenfeld. There is no justification for awarding counsel fees to a woman on

*In Taylor v. Louisiana, 43 L.W. 4167, n. 17, 4171 (January 21, 1975) the Court noted that current employment statistics show that women's "presumed role in the home" has little relationship to present reality. And, in Stanten v. Stanten, 43 U.S.L.W. 4449 at 4452 (April 15, 1975) the Court explained:

Women's activities and responsibilities are increasing and expanding...The presence of women in business, in the professions, in government and, indeed, in all walks of life...is apparent and a proper subject of judicial notice.

the basis of the outdated and invidious stereotype, that it is inappropriate for a male spouse to allow a female spouse to undertake financial obligations.

The award of counsel fees to petitioner's former wife and the denial of petitioner's application for counsel fees constitutes a refusal of the court below to countenance the fact that males are not necessarily the breadwinners in the family as traditional role dictates. The women's role is simply not seen as breadwinner and her professional career is not looked upon as a serious life choice with concomitant financial responsibility. Thus, identically situated male and female spouses are treated differently in awarding counsel fees solely on the basis of gender. A woman in petitioner's position would not have had the other party's attorney's fees levied against her.

In those cases involving sex-

classifications based upon role stereotyping the Court has held the discrimination unconstitutional. Cases following that principle include Eslinger v. Thomas, 476 F.2d 225 (4th Cir. 1973) (equal protection requires that young women be permitted to serve as pages in South Carolina Senate under the same terms and conditions as young men); Bowen v. Hackett, 361 F. Supp. 854 (D.R.I. 1973) (dependent child allowance must be furnished disabled and unemployed men and women on the same basis); Smith v. City of East Cleveland, 363 F. Supp. 1131 (N.D. Ohio 1973) (minimum height and weight requirements for municipal police officers discriminate invidiously on the basis of sex); Andrews v. Drew Municipal Separate School District, 371 F. Supp. 27 (N.D. Miss. 1973) (refusal to employ mothers of children born out of wedlock violates due process and discriminates on the basis of sex); Stevenson v.

Castles, Civ. No. 7452 (D.C.Z. November 15, 1974) (free tuition for the children of male but not female employees of the Canal Zone Government and Panama Canal Company "discriminates against women in violation of the equality guaranteed to them under the decisions of the Supreme Court [citing Frontiero] and [Title VII of] the Civil Rights Act [of 1964]"); Moritz v. Commissioner, 469 F.2d 466 (10th Cir. 1972); Mollere v. Southeastern Louisiana College, 304 F. Supp. 826 (E.D. La. 1969) (equal protection bars a requirement that unmarried women under 21 live in a state college dormitory when no such requirement is imposed on men); ex rel. Robinson v. York, 281 F. Supp. 8, 16 (D. Conn. 1968); White v. Crook, 251 F. Supp. 401 (M.D. Ala. 1966). Thus the lower courts, following the principles laid down in this Court's recent equal protection decisions, are repudiating sex

discrimination based upon the traditional view of sex roles because, at a minimum, such sex-classifications fail to pass the Reed requirements of reasonableness and a fair and substantial relationship to their purposes.

There is no legitimate state interest being advanced by imposing petitioner's former wife's counsel fees on petitioner solely because he is the male. It constitutes precisely the type of sex-role stereotyping which this Court has repudiated. Moreover, such an imposition is not fairly and substantially related to the purpose of Superior Court Rule 4:42-9(a)(1), which is to assess attorney's fees in matrimonial actions according to the ability to pay and the financial need of the applicant.* Thus, the

*Nor can there be any supportable claim that counsel fees should be awarded to petitioner's former wife under New Jersey Rule 4:42-9(a)(1) on the grounds that

assessment challenged here is without legitimacy and constitutes discriminatory application of the sex-neutral rules and amounts to a denial of equal protection of the laws to petitioner as guaranteed by the Fourteenth Amendment.

Not only the award of counsel fees from petitioner to his former wife, but also the denial of counsel fees to petitioner constitutes a denial of equal protection.

Rule 4:42-9(a)(1) of the Rules of the Superior Court of New Jersey states that in the court's discretion "any party"

she was the successful party. She was not successful in securing the order of visitation she desired. She had sought, unsuccessfully, to eliminate extended overnight vacation visitation. Further, the extended visitation rights hearing was compelled by petitioner's former wife, who, in the divorce case, sought separate consideration of the visitation issue. By challenging petitioner's fitness for full visitation rights on the grounds of his gay lifestyle, petitioner's former wife compelled petitioner to present expert testimony on that issue, thus causing the hearing to extend for six days.

may be awarded attorney's fees, whether the party is successful or not. Therefore, according to the Rule, the court may award counsel fees to petitioner.

The fact that petitioner is a male, and the husband in marriage, does not preclude award of counsel fees to him even though traditionally counsel fees were always awarded to wives in matrimonial actions. The revision of the New Jersey family court act whereby a husband may be granted alimony or granted counsel fees indicates that the purpose of the state is to equalize the rights and duties of husbands and wives regarding financial burdens. Counsel fees were awarded to a husband in Schwartztein v. Schwartztein, 94 N.J. Super. 590 (1967).

As discussed previously, when considering the award of counsel fees the court should consider the financial ability to pay and the need of the applicant.

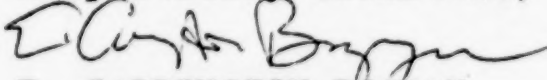
In this case, petitioner's former wife has the ability to pay and petitioner has the need. Although petitioner's counsel below did not charge fees, he is still entitled to them if petitioner's former wife can pay.

Any refusal to award fees to petitioner merely because he is the husband, and the husbands traditionally did not receive awards of counsel fees, is sex discrimination and is a denial of equal protection of the laws as guaranteed by the Fourteenth Amendment to the United States Constitution.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,


E. CARRINGTON BOGGAN
Boggan & Thom
Attorneys for Petitioner
5 East 57th Street
New York, New York 10022

1a

SUPREME COURT OF NEW JERSEY
M-175 SEPTEMBER TERM 1976

IN RE: J.S. & C. : O R D E R

This matter having been duly
presented to the Court, it is ORDERED
that the motion to dismiss the appeal is
granted.

WITNESS, the Honorable Richard J.
Hughes, Chief Justice, at Trenton, this
1st day of November, 1976.

/s/ Florence R. Peskoe
Clerk

F I L E D
NOV 1 1976
/s/ Florence R. Peskoe
CLERK

A TRUE COPY

/s/ Florence R. Peskoe
CLERK

2a

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-1293-74

RECORD IMPOUNDED

IN THE MATTER OF
J. S. & C.

Argued May 24, 1976 -- Decided
JUN 22 1976

Before Judges Fritz, Seidman and
Milmed.

On appeal from the Superior Court
of New Jersey, Chancery Division,
Bergen County, those opinion is
reported at 129 N.J. Super. 486.

Mr. Seymour Wishman argued the
cause for the appellant (Messrs.
Barry, Lofton and Wishman, attor-
neys; Ms. Marilyn G. Haft, Ameri-
can Civil Liberties Union, on the
brief).

Mr. Richard L. Amster argued the
cause for the respondent (Messrs.
Amster & Levin, attorneys).

PER CURIAM

The defendant-father appeals from

two orders of the trial court. The first, an order of December 23, 1974, provided for his visitation (with limitations) with the three minor children of the dissolved marriage.¹ The second, an order of April 8, 1975, among other things: (a) awarded a counsel fee of \$10,000 to the attorneys for the plaintiff-mother, \$3,000 of which is required to be paid by defendant; and (b) denied defendant's attorneys' application for an award of a counsel fee.

At oral argument, counsel informed us of a further order made by the trial court on August 6, 1975. The terms of this later order to which the parties apparently agreed, include: permission for the mother to establish a permanent abode outside of New Jersey and to have

¹The terms of the visitation order are those set forth in the opinion of the court at 129 N.J. Super. 498.

the children reside with her,² and amendment of the visitation schedule in the December 23, 1974 order to provide the father "with one week's visitation during the Christmas school holidays, one week's visitation during the Easter school holidays, and four weeks' visitation during the summer school vacation." The term of the August 6, 1975 order to which the parties did not agree (item numbered "(4)" thereof), is that which in effect continued in force the provisions of the December 23, 1974 order relating "to the mode and manner in which defendant may exercise his right to visitation with" the children.³ This is the only aspect of

²We are informed that the mother has remarried and is presently living with her husband and the three children in Ohio.

³See conditions set forth by the trial judge at 129 N.J. Super. 498. In regard to condition numbered "2" we were informed by counsel at oral argument that "The Firehouse" was destroyed by fire.

the visitation order which is in issue on this appeal.

We affirm the order for visitation under review (as modified by the order of August 6, 1975) substantially for the reasons expressed by Judge Lucchi in his opinion of July 26, 1974 reported at 129 N.J. Super. 486 (Ch. Div. 1974).

Additionally, the order for counsel fee under review (as modified by the order of August 6, 1975 in regard to the provision relating to the mortgage on the marital home) is affirmed substantially for the reasons expressed by Judge Lucchi at the hearing of March 10, 1975. Beyond thus, we note that, in light of the record and counsel's certification as to services, "the amount of the allowance may be considered to be within the broad limits of the trial court's discretionary authority." Schlemm v. Schlemm, 31 N.J. 557, 585 (1960); Fern v. Fern, 140 N.J.

Super. 121, 125 (App. Div. 1976); R. 4:42-9(a) and R. 4:75. No costs.

A TRUE COPY

/s/ Elizabeth McLaughlin

Clerk

Order for Counsel Fees

Filed: April 11, 1975

AMSTER & LEVIN, P.A.
 11 Commerce Street
 Newark, New Jersey 07102
 (201) 642-0123
 Attorneys for Plaintiff

 IN THE MATTER OF

J., S., and C.

) SUPERIOR COURT
) OF NEW JERSEY
) CHANCERY DIVISION
) BERGEN COUNTY
)
) Docket No.
) M-11937-70
)
) CIVIL ACTION
) ORDER FOR
) COUNSEL FEE, ETC.

This matter coming on on cross-applications for the award of counsel fees and costs before the Honorable Benedict E. Lucchi, a Judge of this Court, on several dates prior hereto and on March 10, 1975, in the presence of Amster & Levin, P.A., attorneys for plaintiff Kytja Voeller (Richard L. Amster, Esq., appearing), and Barry, Lofton & Wishman, attorneys for defendant Bruce Voeller (Seymour Wishman, Esq., appearing, and the Court

having admitted Marilyn G. Haft, Esq., of the New York Bar, appearing for the American Civil Liberties Union, also acting on behalf of the defendant), and the Court having considered the Affidavits and Certifications filed in the cause, as well as the legal memoranda submitted by the parties, and having considered the oral arguments made in support of the respective positions of the parties,

IT IS, on this 8 day of April, 1975,

ORDERED AND ADJUDGED:

(1) that there be awarded a counsel fee to Amster & Levin, P.A., attorneys for plaintiff Kytja Voeller, of \$10,000, of which \$3,000 is to be paid by defendant Bruce Voeller.

(2) that the out-of-pocket expenses of Amster & Levin, P.A., in the amount of \$94.98 are approved for payment, of which \$31.66 is to be paid by defendant Bruce

Voeller.

(3) that the mortgage given by plaintiff Kytja Voeller to defendant Bruce Voeller covering premises 106 E. Linden Avenue, Englewood, New Jersey, which presently has a principal balance due thereon of \$3,555, be assigned by defendant Bruce Voeller to Seymour Wishman, Esq., and that such assignment be recorded in the Bergen County Register's Office. Seymour Wishman, Esq., shall hold such mortgage and the bond given in connection therewith in escrow pending:

(a) the expiration of the time to appeal from this determination;

(b) a final affirmance of this determination by the appropriate appellate court;

(c) in event of either of the foregoing occurrences, the said Seymour Wishman shall deliver such mortgage to

plaintiff Kytja Voeller duly endorsed for cancellation of record and at the same time shall deliver the original bond given in connection with such mortgage, and defendant Bruce Voeller shall be credited with the principal balance then due on such mortgage and shall in a timely manner pay any balance due under the terms of this Order.

(d) Plaintiff Kytja Voeller shall continue to pay on account of such mortgage in accordance with its terms until the principal payments have reduced the principal balance due to \$3,031.66, at which time no further payments of principal or interest shall be made on such mortgage pending the occurrence of (a) or (b);

(e) in the event of a reversal of this determination by the appropriate appellate court and a final determination that no counsel fee is payable by defendant,

or in the event that defendant Bruce Voeller pays in full the obligations imposed hereunder, then and in that event this mortgage shall be re-assigned to defendant Bruce Voeller by Seymour Wishman, and plaintiff Kytja Voeller shall pay off the principal balance of such mortgage in full plus any accrued interest thereon.

(4) that the application of the firm of Barry, Lofton & Wishman, attorneys for defendant Bruce Voeller, for the award of a counsel fee and recovery of out-of-pocket expenses be and the same is hereby denied.

/s/ BENEDICT E. LUCCHI J.D.C.,
T/A
 J.S.C.

Consented to as to
 form.

BARRY, LOFTON & WISHMAN
 Attorneys for Defendant
 BRUCE VOELLER

By /s/ Seymour Wishman
 SEYMOUR WISHMAN, ESQ.

SUPERIOR COURT OF NEW JERSEY
 CHANCERY DIVISION-BERGEN COUNTY
 DOCKET No. M-11937-70

KYTJA S. VOELLER, :
 Plaintiff :
 vs. : MOTION FOR
 : COUNSEL FEES
 BRUCE R. VOELLER, :
 Defendant. :

Hackensack, N.J.
 March 10, 1975

BEFORE: Hon. Benedict E. Lucchi,
 Judge.

APPEARANCES:

Amster & Levin, Esqs.
 By: Richard L. Amster, Esq.,
 Attorney for Plaintiff.

Barry, Lofton & Wishman, Esqs.
 By: Seymour Wishman, Esq.,
 Attorney for Defendant
 and
 Marilyn G. Haft, Esq.,
 American Civil Liberties Union,
 Attorney for Defendant.

Joseph Mattliano
 Official Court Reporter
 Court House
 Hackensack, N.J. 07601

[2]

THE COURT: Mr. Amster, what was the total amount expended by you in costs?

MR. AMSTER: I think it is in the affidavit. I did not bring the file up.

THE COURT: The reason I have asked you to come down this morning and delayed in entering counsel fees in this matter is that there has been quite a bit of discussions, not on this case, but in other cases generally, in the office of the Administrative Director in which there have been questionnaires handed out, and I felt this would be the case that would lay the ground rules.

Now, is there any question in your mind, or is there any dispute, as to whether or not the court may set the entire fee?

MR. AMSTER: I think this court has the widest possible latitude, and I don't know what you mean by the entire fee.

THE COURT: I will be more specific in that the court can set a fee regardless of what the parties do.

MR. WISHMAN: That's true, but in our case, it is our position that the matter was dealt with explicitly by the court at the time of the entry of the judgment. It is our position that the court dealt

[3]
explicitly with this problem in the final judgment of divorce. There has been discussions prior to the entry of that judgment, though, and negotiations, and the like.

THE COURT: Aside from that, we have the case before us and I am not concerned about whatever stipulations were made as to the divorce action but rather at this time the court is concerned as to whether or not the court controls or makes the full fee, what shall be paid.

In other words, let me

put it this way. Assume your client agreed to pay you \$15,000.00 and I found that was out of order, you follow me?

MR. WISHMAN: Yes.

THE COURT: Now, I say \$5,000.00 and negate anything that you entered into. Do you have any problems with that?

MR. AMSTER: I would have a problem with that.

THE COURT: That is what I want to hear you on.

MR. AMSTER: Unless you found the arrangement between the attorney and his client is unconscienable. What we are asking for is an award of a fee from the other party making an application in this court.

THE COURT: No, you and I spoke off the record in the matter and I told you what was disturbing me.

[4]

MR. AMSTER: Yes.

THE COURT: That is why we are here.

MR. AMSTER: I don't follow you. Are you saying that this Court can do anything it wants, of course, Your Honor, you can make a finding that the arrangement between a lawyer and his client is unconscienable, I think you can.

THE COURT: I don't like to use the word, unconscienable. I don't think the issue of being conscienable of unconscienable enters the consideration.

MR. AMSTER: I think the arrangement I made -- I said I made an arrangement with my client. I got a retainer, and I filed an affidavit saying what I thought was an appropriate counsel fee based upon the hours involved, and I made an application that the court grant me an allowance from the other side.

THE COURT: I am not going to stand with the fee you quoted.

MR. AMSTER: That is entirely within

your discretion to fix the fee, but I still can look to my client to be paid.

THE COURT: Suppose I tell her not to pay you, then, where are you?

MR. AMSTER: Do I understand that that is what is before this court at this particular time?

[5]

THE COURT: That is what has been holding this up.

MR. AMSTER: I don't follow.

THE COURT: I said to you that the issue of counsel fees in this matter revolves around the instant case wherein the wife made ex dollars and the husband made ex-minus dollars. We are not going into the question of why he is not making it. You don't have that here. It is the court's opinion that counsel should be compensated with so much. My opinion in this case is that you should be compensated \$10,000.00, and that this fee of

\$10,000.00 is a total fee.

MR. AMSTER: I have no objection to that.

THE COURT: And of that \$10,000.00 fee, \$7,000.00 is to be paid by the wife and \$3,000.00 by the defendant.

MR. AMSTER: I can't argue that.

THE COURT: I want you to know what the thinking of the court is. As to your total costs, one-third shall be borne by the husband and two-thirds by the wife.

MR. AMSTER: I was satisfied with that in the letter I wrote to Your Honor.

THE COURT: I wanted this for the record. There is a particular reason why I wanted this on the

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record. I think that possibly you might take an appeal and I would like that straightened out once and for all.

MR. AMSTER: I would not take an appeal because of my fees, which are less

than three thousand dollars than I asked for.

THE COURT: I don't want to convey that thought to you.

MR. AMSTER: Or fix my fee at three thousand dollars less than I asked for.

THE COURT: It should be three thousand dollars less, not considering the work you did, or the result you obtained, but on the amount of money available between these people.

MR. AMSTER: I would never take an appeal on that basis.

THE COURT: You might be doing me a favor by appealing.

MR. WISHMAN: We would take an appeal on that with respect to any application for counsel fee as indicated by your Honor's decision, and I would like the basis for your Honor's ruling for granting counsel fees.

THE COURT: I think that the wife

is put in a position by this new issue that came up, as to the homosexuality.

MR. WISHMAN: That was the basis for the judgment

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of divorce. I don't want to argue with the court.

THE COURT: This is the doing of your client which required that the wife go through some extensive litigation. I considered how much he earned. I considered the assets of the parties, and that is how I came to that conclusion.

MR. WISHMAN: May I apply for a stay of your Honor's ruling pending an appeal.

MR. AMSTER: I would argue against that for a very simple reason. I would have no objection if they will put up a supersedeas bond to protect us in the event they are unsuccessful on appeal.

THE COURT: There is a mortgage laying around, isn't there?

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MR. AMSTER: Yes.

THE COURT: How much is left on the mortgage?

MR. AMSTER: Less than three thousand dollars.

MR. WISHMAN: I don't know. I think it is around that figure.

THE COURT: Would you agree that no payment be made under the mortgage?

MR. AMSTER: And not to sign. You hold it.

MR. WISHMAN: I can't agree to that until I spoke to my client.

THE COURT: Speak to your client and renew your

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application. He should be protected. This is the only way I know to protect him.

MR. WISHMAN: Very well.

* * * * *

I, JOSEPH MATTLIANO, a Certified

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Shorthand Reporter of the State of New Jersey do hereby certify that the foregoing is a true and accurate record of my stenographic notes.

/s/ Joseph Mattliano
Joseph Mattliano

Dated May 9, 1972